

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of:

EDMOND MICHAEL KILBOURN,
KILBOURN AND ASSOCIATES
d/b/a/ KILBOURN, PRICE AND
ASSOCIATES AND COMMERCIAL
INVESTMENT GROUP,

Respondents

HUDALJ 89-1396-DB

INITIAL DETERMINATION

Statement of the Case

This proceeding arose as a result of a proposal by the Department of Housing and Urban Development ("the Department" or "HUD") dated August 16, 1989, to debar Edmond Michael Kilbourn, a/k/a Mike Kilbourn and Michael Kilbourn ("Kilbourn" or "Respondent Kilbourn"), and his named affiliates, Kilbourn and Associates, d/b/a Kilbourn Price and Associates and Commercial Investment Group ("Kilbourn and Associates" or "Respondent Kilbourn and Associates"). Pursuant to the proposal, Respondents Kilbourn and Kilbourn and Associates are to be debarred from further participation in nonprocurement activities throughout the Executive Branch of the Federal Government and from participation in procurement activities with HUD, as set forth in 24 C.F.R. sec. 24.110(a)(1), for a period of three years beginning December 28, 1988, the date of Kilbourn's earlier suspension.

The Department's actions are based upon Kilbourn's conviction, in the United States District Court for the Western District of Michigan, for violating 18 U.S.C. secs. 1010 and 2. Respondents requested a hearing on the proposed debarment by letter dated September 15, 1989. Because the proposed action is based upon a conviction, the hearing was limited under 24 C.F.R. sec. 24.313(b)(2)(ii) to submission of documentary evidence and written briefs. This matter being ripe for decision, I now make the following findings and conclusions based upon the record submissions:

Findings of Fact

Kilbourn and Associates, Inc. was incorporated under the laws of the State of Michigan in 1978. The company specializes in commercial and investment real estate. At the time of incorporation, Respondent Kilbourn was the entity's sole incorporator, and, until August 26, 1989, served as its President and as a director. Until August 26, 1989, Kilbourn also owned all of the outstanding and issued stock in the company. On that date, Kilbourn transferred all of his stock in the company to Martha A. Wintermeyer, and Ms. Wintermeyer became the company's sole officer and director. As set forth in Certificates of Assumed Name filed with the State of Michigan on October 21, 1988 and February 9, 1989, Kilbourn and Associates, Inc. was authorized to transact business under the additional names of Kilbourn-Price & Associates, Inc., and Commercial Investment Group, Inc., respectively. Exhibits ("Exs.") E, F to Government's Brief in Support of Debarment ("Government's Brief"); Brief in Support of Respondents' Answer and Request for an Appeal ("Brief in Support of Answer") at 19; Exs. 1, 2, 3, 4 to Respondents' Reply Brief.

In January 1989, Kilbourn entered a plea of guilty in the U.S. District Court for the Western District of Michigan for making false statements to HUD as set forth in Count 1 of a Superseding Information. Count 1 of the Superseding Information stated that for the purpose of obtaining a HUD-insured loan to purchase certain property, on or about October 26, 1983, Kilbourn prepared and submitted to HUD a HUD Settlement Statement in which he represented that the buyer had made the required downpayment despite his knowing that the downpayment had not been made. Count 1 further stated that Kilbourn's actions violated 18 U.S.C. secs. 1010 and 2. Exs. B, C to Government's Brief.

As a result of his guilty plea, Kilbourn was convicted on Count 1 of the Superseding Information, and was sentenced to two years imprisonment, on the condition that he be confined in a jail type institution for 179 days, with the balance of the sentence of imprisonment suspended. Kilbourn was also placed on probation for four and one-half years, to commence upon his release from confinement and subject to his: (1) making restitution in the amount of \$19,250.22, (2) paying a fine of \$5,000.00, (3) performing 400 hours of community service, and (4) refraining from real estate practice, not acting in any way as a real estate broker, and not being involved in teaching investment and/or real estate type classes. Ex. C to Government's Brief.

The Indictment which had preceded the Superseding Information was handed down in October 1988 and was the basis upon which HUD suspended Kilbourn effective December 28, 1988. The Indictment's counts involved the same transaction which was the subject of the Superseding Information, but charged Kilbourn with violating 18 U.S.C. secs. 1001 and 2. Exs. A, D to Government's Brief. As noted above, on August 16, 1989, HUD advised Kilbourn that based upon his conviction in Federal district court, he and his named affiliates were the subjects of a proposed three-year debarment to run from his suspension date of December 28, 1988. On August 16, 1989, HUD further advised Kilbourn that, pending final

determination of this matter, he would continue to be suspended and his named affiliates would also be suspended. Official File, Attachment to Notice of Appointment of Hearing Officer.

Discussion

Kilbourn does not deny that he is a person who has participated in a HUD nonprocurement program and that he is a principal as that terminology is used in the Department's debarment and suspension regulations. See 24 C.F.R. secs. 24.110(a) and 24.105(p). The Government relies upon the cause stated in 24 C.F.R. sec. 24.305(a)(3) as the ground for debarment of Respondent Kilbourn. This regulation provides for debarment for conviction of or civil judgment for

Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, or obstruction of justice[.]

The Government also relies on 24 C.F.R. sec. 24.313(b)(3) which provides that where a proposed debarment is based upon a conviction, cause for debarment is deemed to have been established by the requisite preponderance of the evidence. The Government further argues that a three-year debarment of Respondent Kilbourn is necessary to protect the public interest, and that his arguments in mitigation are not sufficient.

As to Respondent Kilbourn and Associates, the Government argues that it is an affiliate, subject to debarment, as the term "affiliate" is defined in 24 C.F.R. sec. 24.105(b):

Persons are affiliates of each another if, directly or indirectly, either one controls or has the power to control the other, *or*, a third person controls or has the power to control both. Indicia of control include, but are not limited to: interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized following suspension or debarment of a person which has the same or similar management, ownership, or principal employees as the suspended, debarred, ineligible, or voluntarily excluded person.

(Emphasis in original). See *also* 24 C.F.R. sec. 24.325(a)(2)(scope of debarment may include named affiliates).

Respondent Kilbourn acknowledges the existence of cause for his debarment based upon his conviction in Federal district court. However, Kilbourn asserts that he has presented evidence which militates against imposition of a debarment in this case. In mitigation, he admits that as the broker of the transaction at issue, he signed a HUD

Settlement Statement which falsely represented that the buyer of the property had paid \$2000.00 in earnest money. However, he claims that his actions were "based solely on [his]

desire to help a needy, prospective homeowner", who was a personal acquaintance of his. Respondents' Reply Brief at 1; Brief in Support of Answer at 3-4.¹ Moreover, Kilbourn asserts that "[a]s the financial arrangements worked out at the time of closing, the actual bottom line numbers on the closing statement were accurate because [he] waived significant portions of his [\$4,300.00] commission and, in actuality, received only... \$2,590.00... as commission." Brief in Support of Answer at 5, 7. Kilbourn also relies upon his military service, his community service in charitable and volunteer activities, and his good character as further evidence in mitigation. In that regard, he has introduced letters of various member of the community attesting to his character, community associations and activities, and an autobiographical statement setting forth his personal background. *Id.* at 14-21.

Respondent Kilbourn and Associates asserts that it, too, should not be debarred because it has presented evidence which demonstrates that it is no longer affiliated with Respondent Kilbourn. According to Respondent Kilbourn and Associates, there is no evidence "indicating that any current employee or agent of that entity committed any wrongdoing"; Respondent Kilbourn "has no interest whatsoever in the assets of Kilbourn and Associates", nor does he have any "management or other responsibilities with the organization"; and Respondent Kilbourn "will have no involvement in the real estate activity being conducted in that office or in any other office for a period of four and one-half (4 1/2) years." *Id.* at 22. As support for these assertions, Respondent Kilbourn and Associates has introduced the corporate documents which show that on August 26, 1989, Respondent Kilbourn transferred his interest in Kilbourn and Associates, Inc. to Martha A. Wintermeyer, and resigned his positions as an officer and director of that entity. Presently, Ms. Wintermeyer is the sole stockholder of Kilbourn and Associates, Inc., as well as its only officer and director. Respondents' Reply Brief at 3 and Exs. 1, 2, 3, 4 thereto.

¹As acknowledged by Kilbourn:

As broker to the transaction, [he] signed a certification which verified the numbers on the closing statement. The statement gave credit to [the buyer] for an earnest deposit of...\$2,000.00....However, the...\$2,000.00...was in the form of a note and, although [the buyer] made good on that note (from credits in the closing), [he] admits that he was wrong to make the certification. The funds were not on deposit in cash.

Brief in Support of Answer at 5.

Debarment is a sanction which may be invoked by HUD as a measure for protecting the public interest by ensuring that only those qualified as "responsible" are allowed to conduct business with the Federal Government. See 24 C.F.R. sec. 24.115(a). See also *Stanko Packing Co. v. Bergland*, 489 F. Supp. 947, 949 (D.D.C. 1980); *Roemer v. Hoffman*, 419 F. Supp. 130, 131 (D.D.C. 1976). "Responsibility" is a term of art used in government contract law. It encompasses the projected business risk of a person doing business with the federal Government. This includes integrity, honesty, and ability to perform. The primary test for debarment is present responsibility, although a finding of present lack of

responsibility can be based upon past acts. See *Schlesinger v. Gates*, 249 F.2d 111 (D.C. Cir. 1957); *Roemer, supra*. Respondent Kilbourn evidences a clear lack of present responsibility based upon his conviction for falsely and knowingly representing that the downpayment had been made in order to accomplish the sale of the property insured by FHA. This indicates a lack of business integrity and honesty and substantially increases the Government's risk in dealing with him. Thus, as acknowledged by Kilbourn, his conviction for knowing falsification is cause for debarment.

Debarment is a serious action which can be used "only in the public interest and for the Federal Government's protection and not for the purposes of punishment." See 24 C.F.R. sec. 24.115(b). Moreover, the existence of cause for debarment does not necessarily require that the sanction be applied. The seriousness of the acts or omissions at issue, and any mitigating factors should be considered in deciding whether to impose a debarment. *Id.* at sec. 24.115(d). Even when the sanction is imposed, the period of debarment must be "for a period commensurate with the seriousness of the cause(s)." *Id.* at sec. 24.320(a). Where the cause for debarment is a conviction, the regulations provide that the period of debarment "generally should not exceed three years"; however, "[w]here circumstances warrant, a longer period of debarment may be imposed." *Id.* at sec. 24.320(a)(1).

Respondent Kilbourn does not dispute the seriousness of the acts at issue but, rather, offers evidence which in his view is mitigating and obviates the need for imposition of a debarment in this case. I am unpersuaded that the evidence he relies upon is sufficient to avoid imposition of a debarment.

Kilbourn argues that in knowingly falsifying the HUD Settlement Statement, he was not motivated by personal financial gain, but rather by a desire to assist a "needy" buyer with whom he was personally acquainted. Kilbourn further argues that the "bottom line" numbers on the Statement were "accurate" because he waived portions of his commission. However, neither Kilbourn's purportedly benign motivation nor the purported accuracy of the Statement's bottom line, if adjusted for extraneous transactions unreported on the Statement, justify his knowing falsification in order to procure funds from a federal program. The result of such a falsification is to frustrate the purpose of that federal program which is to aid an identified class of beneficiaries. The identification of those beneficiaries is dependent upon the integrity of the application process and the veracity of individual

applications. Kilbourn's conduct and his explanations offered in mitigation demonstrate that as a person engaged in business dealings involving this federal program, he cannot be expected to act with the candor and probity necessary for HUD to make such determinations of eligibility.

Finally, contrary to the position taken by Kilbourn, his personal background does not militate against imposition of a debarment. While much of his personal background, including his military and community service, is laudatory, it does not excuse the seriousness of his knowing falsification, especially when consideration is given to the fact that he has had years of experience in conducting a real estate practice and has taught courses in income property analysis at the college level.

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The Department has proposed that a three-year debarment be imposed. I conclude that as to Respondent Kilbourn, such a period of debarment is commensurate with the seriousness of the cause of debarment in this case, and is therefore appropriate. Not only could the Department have sought a longer period of debarment under the regulations, but also the period of debarment proposed by the Department is of shorter duration than his probation, which prohibits him from engaging in real estate practice for four and one-half years from the time of his release from imprisonment.

The evidence introduced by Respondent Kilbourn and Associates as to the status of its relationship to Kilbourn was uncontroverted by the Government.² Accordingly, I conclude that any association between it and Respondent Kilbourn terminated as of August 26, 1989, when Respondent Kilbourn transferred all of his stock in Kilbourn and Associates, Inc. to Ms. Wintermeyer, and resigned his positions as an officer and director of that company.³

²This evidence was introduced by Kilbourn and Associates as exhibits to Respondents' Reply Brief. The Government did not submit, nor seek to submit, any response to that Reply Brief. The record shows that prior to Kilbourn's August 26, 1989 severance of his ties to Kilbourn and Associates, Ms. Wintermeyer, the current and sole officer, director and shareholder of the company, had served as the company's treasurer. Ex. F to Government's Brief. The record also includes a January 20, 1989 letter submitted by Ms. Wintermeyer in connection with Respondent Kilbourn's sentencing in Federal district court. That letter indicates that at that time, Ms. Wintermeyer was employed by the University of Michigan as an administrative assistant in the Department of Chemistry. The letter reveals the circumstances of the personal relationship she and her husband had with Kilbourn, as well as the fact that Ms. Wintermeyer's husband and Kilbourn had "[o]ver the years...entered into various real estate partnerships." Ex. 9 to Brief in Support of Answer. The Government did not address this evidence or suggest any possible inference from it that Mr. Kilbourn, indirectly through Ms. Wintermeyer, continues to exercise control over the company or has the power to do so. However, had such an argument been made, that evidence, standing alone, would be insufficient to form the basis of an ultimate conclusion that control, or the power to control, exists, especially in the face of the terms of Kilbourn's probation which would prohibit the exercise of such control through that relationship.

³In its Brief, the Government relies on the Secretarial Determination in *Carroll P. Kisser and Daniel W.*

O'Donoghue, Jr. dated August 4, 1989 (HUDALJ Nos. 89-1341-DB and 89-1346-DB) for the principle that where a respondent asserts that the affiliation at issue has terminated, "[t]he agency can look behind the transaction to determine whether the affiliate status still exists." Government's Brief at 7. In that regard, however, the Government further states:

If acceptable evidence is provided indicating that Respondent [Kilbourn] is no longer involved in Kilbourn and Associates and that the reorganization is not a sham to avoid the effects of debarment, then Kilbourn and Associates would be eligible to apply for reinstatement. Absent such proof, Kilbourn and Associates must continue to be treated as an affiliate of Respondent Kilbourn.

Id.

The Government's reliance on the Secretarial Determination in *Kisser and O'Donoghue*, *supra*, is correct for the proposition that the Department may examine the facts and circumstances surrounding a purported termination of affiliation in order to ascertain whether the termination is a sham. However, the Government has apparently interpreted that Secretarial Determination to stand for the proposition that the burden of proof rests with the respondent to demonstrate that it should not be treated as an affiliate. That position is contrary to fundamental principles of due process, as well as the Department's own regulations governing debarment actions, which provide that "[t]he agency proposing debarment has the burden of [proof] to establish cause for debarment. The respondent has the burden of proof for establishing mitigating circumstances." 24 C.F.R. sec. 24.313(b)(4).

Once the Government establishes a *prima facie* case of affiliation, the burden of production shifts to the respondent to show that the basis of the affiliation no longer exists, *e.g.*, that a complete and actual break in the relationship between the principal and the alleged affiliate has occurred. Only then does the burden of production shift back to the Government to demonstrate that the transfer of ownership, creation of a new entity or other step taken to terminate the affiliation was a sham or a pretext. The ultimate burden of proving affiliation as the basis for a debarment remains at all times with the Department.

Indeed, those actions were consistent with the term of his probation which prohibits him from engaging in real estate practice for a period of four and one-half years from his release from incarceration, since real estate practice is the very nature of Kilbourn and Associates' business. The Government has failed to show that the evidence of his sale of stock and his resignation as an officer and director of Kilbourn and Associates is a sham or pretext. This record contains insufficient evidence to find indicia of control by Kilbourn over Kilbourn and Associates, or by the latter over the former. Therefore, it would be improper to debar Kilbourn and Associates based upon a mere assertion of affiliation with Respondent Kilbourn.

Conclusion and Determination

Upon consideration of the public interest and the entire record in this matter, I conclude and determine that good cause exists to debar Respondent Edmond Michael Kilbourn, a/k/a Mike Kilbourn and Michael Kilbourn, from further participation in primary covered transactions and lower tier covered transactions (see 24 C.F.R. sec. 24.110(a)(1)) as either a participant or principal at HUD and throughout the Executive Branch of the federal Government and from participating in procurement contracts with HUD for a period of three years from December 28, 1988. I further conclude and determine that good cause has not been shown to exist to debar Respondent Kilbourn and Associates, d/b/a Kilbourn Price and Associates and Commercial Investment Group.

Alan W. Heifetz
Chief Administrative Law Judge

Dated: January 23, 1990